

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

WEDNESDAY, THE 28TH MARCH 2007 / 7TH CHAITHRA 1929

CRL.A.No. 1160 of 2006()

S.C. 129 OF 2001 OF THE ADDL. SESSIONS JUDGE (SPECIAL
COURT FOR THE TRIAL OF ABKARI ACT CASES)

APPELLANT: ACCUSED:

SHAJI, S/O. JANARDHANAN
GIRIJA BHAVAN VEEDU, DHAVALIAKULAM DESOM,
NEYYATTINKARA VILLAGE.

BY ADV. SRI.SASTHAMANGALAM S. AJITHKUMAR

RESPONDENTS: COMPLAINANT:

STATE OF KERALA, REP. BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 28/03/2007, ALONG WITH OTHER CONNECTED CASES
THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

V. RAMKUMAR, J.

Crl. Appeal Nos. 1160 of 2006, 1308 of 2006

&

2039 of 2006

Dated, 28th day of March 2007

JUDGMENT

Accused Nos. 3, 2 and 1 respectively in S.C. No. 129/'01 on the file of the Addl. Sessions Court For The Trial of Abkari Act Cases, Neyyattinkara, are respectively the appellants in these Appeals. Crl. A. Nos. 1160 of 2006 and 1308 of 2006 are preferred by accused Nos. 3 and 2 through private counsels. Crl. Appeal No. 2039 of 2006 is preferred by the first accused from the Central Prison, Thiruvananthapuram and represented through State Brief.

2. In these appeals, the three accused persons challenge the conviction entered and the sentence passed against them for an offence punishable under Section 58 of the Abkari Act.

3. The case of the prosecution is that on 14-3-1998 at about 7 p.m. the Sub Inspector of Police, Neyyardam and his police party while on patrol duty stumbled upon an autorickshaw bearing Reg. No. KL 01 L 8589 driven by the 3rd accused and carrying accused Nos. 1 and 2 as passengers along with the jerry can having a capacity of 10 litres. He

signalled the autorickshaw to stop and, on interrogation, the accused persons admitted that the jerry can contains arrack. Thereupon the Sub Inspector arrested the accused persons and seized the jerry can under a mahazar prepared from the spot. The accused as well as the properties were taken to the Neyyadam Police Station from where a case was registered as Crime No. 32/98. The accused were produced before the J.F.C.M., Kattakkada and the properties were produced before the Magistrate, subsequently. The sample taken therefrom and dispatched to the Chemical Examiner's Laboratory, Thiruvananthapuram through court revealed that the sample contained 14.80 percent by volume of Ethyl Alcohol. The accused have thereby committed an offence punishable under Sec. 58 of the Abkari Act.

4. On the accused pleading not guilty to the charge framed against them by the court below for the aforementioned offence, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 6 witnesses as P.W.s 1 to 6 and got marked 9 documents as Exts. P1 to P9 and 3 material objects as Mos 1 and 3.

5. After the close of the prosecution evidence, the accused were

questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against them in the evidence for the prosecution. They denied those circumstances and maintained their innocence.

6. Since the learned Addl. Sessions Judge did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the accused persons were called upon to enter on their defence and to adduce any evidence which they might have in support thereof. They did not adduce any defence evidence.

7. The learned Addl. Sessions Judge, after trial, as per judgment dated 8-6-2006 found all the appellants guilty of the offence and sentenced them to rigorous imprisonment for three years and to pay a fine of Rs. 1,00,000/- each and on default to pay the fine, to suffer rigorous imprisonment for six months. It is the said judgment which is assailed in these appeals.

8. I heard Advocate Sri. Sasthamangalam Ajithkumar, the learned Counsel appearing for the appellant in Crl.A. 1160 of 2006 and Adv. Sri. R.T. Pradeep, the learned counsel appearing for the appellant in Crl. Appeal No. 1308 of 2006 and Adv. Sri. P.V. Vijayakumar, the

learned counsel who defended the appellant in Crl.Appeal No. 2039 of 2006 on State Brief. I also heard Adv. Sri. K.S. Sivakumar, the learned Public Prosecutor who defended the State.

9. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

10. P.Ws 1 and 2 are the independent witnesses who had figured as attestors to Ext.P1 mahazar prepared by the detecting officer. Even though both of them admitted their signatures in the mahazar they turned hostile to the prosecution. P.W.3 is the owner of the autorickshaw examined to say that it was the 3rd accused who was driving the autorickshaw on the fateful day. P.W.4 was the head constable of Neyyadam Police Station who was in the company of the detecting officer. P.W.5 was the Sub Inspector of Police, Neyyadam who detected the offence. P.W.6 was the Thondi Section Clerk attached to the J.F.C.M., Court, Kattakkada which was the committal court in respect of this case.

11. After an anxious consideration of the oral and documentary

evidence in the case and after hearing both sides, I am of the view that the prosecution has not succeeded in establishing the guilt of the accused beyond reasonable doubt. Notwithstanding the disloyalty shown by P.W 1 and 2, the evidence of P.Ws 4 and 5 can be accepted to hold that the accused persons along with MO2 jerry can were in the autorickshaw and that on the reasonable belief that the jerry can contained illicit arrack, P.W. 5 had arrested the accused and seized the jerry can together with the bag and autorickshaw under Ext.P1 contemporaneous mahazar prepared by him from the spot itself. But the further question is whether the contents of MO2 jerry can has conclusively been proved to be illicit arrack so as to justify the conviction.

12. Eventhough P.W.5 claims to have seized the contraband liquor at 7 p.m. on 14-3-1998, the properties were produced before court only on 23-3-1998. Except for a bald statement by P.W.5 from the witness box that until their production in Court the properties were in his custody, he has not given any satisfactory explanation as to why he kept the properties in his custody for 9 days. There is therefore, infraction of Sec. 102 (3) Cr.P.C. That apart, going by the recitals in Ext.P1 mahazar, P.W.5 had, before seizing the jerry can, sealed the same. But the jerry

can described as Item I in Ext.P5 property list is not shown as sealed. This means that there is no acceptable evidence to show that it was the very same jerry can which was seized after sealing the same which was produced before court 9 days after the alleged seizure.

13. The prosecution would have it that the sample taken from the above jerry can by the committal Magistrate and dispatched to the Chemical Examiner has proved the fact that the contents of the jerry can was illicit arrack. The prosecution has not produced any forwarding note or requisition by the investigating agency requesting the committal Magistrate to take sample from MO2 and despatch the same to the chemical examiner for report. In the absence of any such request from the investigating agency it is not known as to why the committal Magistrate took the sample and despatched the same to the chemical examiner. P.W.6 is the thondi Section Clerk who has deposed that on the strength of the orders of the Magistrate he took the sample. Neither Ext.P5 property list nor Ext.P9 certified extract of the relevant page of the thondi section register shows any endorsement by the Magistrate to take sample from the jerry can produced in this case. On the contrary, both Exts.P5 and P9 contain endorsement by the Magistrate on 23-3-1998

directing that the properties be kept in the custody of the Station House Officer until further orders. If that direction of the Magistrate had been promptly complied with, it is not known as to how P.W.6 could take a sample. Even assuming that there was a direction by the Magistrate to do so, P.W.6 does not say the date on which he took the sample or the quantity drawn by him as sample and the mode of despatch of the same to the chemical examiner. What Ext.P8 certificate of analysis shows is that the sample was despatched to the chemical examiner along with a covering letter of the Magistrate dated 18-5-1998 and the sample was produced in the laboratory on 20-5-1998 by P.C. 4386. Ext.P9, no doubt, contains an endorsement that the sample was entrusted to P.C. 4386. But then, it does not carry the date of entrustment. The said police constable also was not examined before court.

14. It is well settled that in a case of this nature the prosecution can succeed in securing a conviction only if it is proved that a sample drawn from the contraband substance seized from the possession of the accused was despatched to the chemical examiner in a tamper proof condition. To put it differently, the prosecution has to inevitably show that the sample which was analysed by the chemical examiner was the

very same sample which was drawn from the contraband liquor alleged possessed by the accused. This is particularly so since the sample which eventually reaches the hands of the chemical examiner changes several hands. (Vide The State of Rajasthan v. Daulat Ram - AIR 1980 SC 1314 and Valsala v. State of Kerala - 1993 (2) KLT 550). In the case on hand, first of all it is doubtful whether jerry can which was produced before court after 9 days of the seizure was the very same jerry can which was seized under Ext.P1 mahazar. Consequently, there is absolutely no contemporaneous record maintained by the committal Magistrate to show that there was a direction to take sample and pursuant to the said direction sample was taken. There is no record showing the date of sampling, the quantity of sample and the date of despatch of the same to the Chemical Examiner etc. All these are capable of record and proof. As mentioned earlier, even without a forwarding note or requisition for sampling it was no part of the duty of the Magistrate to take a sample and send the same to the Chemical Examiner. In the absence of any acceptable evidence to show that the sample which was analysed under Ext.P8 certificate of analysis was the very same sample which was seized from the jerry can allegedly possessed by the accused persons, the

conviction entered and the sentence passed against the appellants cannot be sustained and are accordingly dislodged.

15. The appellants are found not guilty of the offence punishable under Sec. 58 of the Abkari Act and are acquitted thereunder. They are set at liberty. The first accused (appellant in Crl. Appeal 2039 of 2006) shall be released from prison forthwith unless his continued detention is needed in connection with any other case.

In the result, these Criminal Appeals are allowed as above.

V. RAMKUMAR, JUDGE.

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Crl. Appeal Nos. 1160
of 2006, 1308 of 2006 & 2039 of 2006 -:10:-

V. RAMKUMAR, J.

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Crl. Appeal Nos. 1160
of 2006, 1308 of 2006 & 2039 of 2006

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Dated, this the ^{29th} day of

January 2007

JUDGMENT